

11 U.S.C. § 547(c)(1)
11 U.S.C. § 547(c)(2)
11 U.S.C. § 547(c)(4)

In re Smith's Home Furnishings, Inc., Case No. 395-35704-elp7
Batlan v. Merchants Home Delivery Service, Inc., Civ. No. 97-368-
FR; Adv. No. 96-3024

3/20/97

Frye (aff'g ELP)

unpublished

In a letter opinion, the bankruptcy court granted plaintiff's trustee's motion for summary judgment and denied defendant's cross-motion for summary judgment in this preference action. Defendant raised defenses of contemporaneous exchange, ordinary course of business, and new value. As to the contemporaneous exchange defense, the bankruptcy court held that two checks, which the bank stamped "refer to maker" and returned to debtor, and which were subsequently represented to the bank and paid, were dishonored. Once a check is dishonored, it loses its character as a contemporaneous exchange and becomes a credit transaction. The fact that the checks were paid later does not change the fact that the dishonoring of the checks destroyed the contemporaneous nature of the exchange.

As to the ordinary course of business defense, the bankruptcy court held that a dishonored check cannot be in the ordinary course. Even assuming a dishonored check could be in the ordinary course, defendant did not show that it was in the ordinary course of affairs between debtor and this creditor to pay with dishonored checks. The court held that a check paid under a workout agreement is not a payment in the ordinary course of business. The test is whether such payments are ordinary between a healthy debtor and a creditor in the industry. Payment on past-due invoices were not in the ordinary course of business.

As to the new value defense, the bankruptcy court held that transfer by check occurs when the check is honored, if it is not honored within 10 days from the date of execution. Transfer does not occur at the time of delivery unless the check is honored within 10 days of execution.

The District Court affirmed in all respects.

P97-6(2)

FILED

Entered on the Docket on
3/20/97
DONALD M. CINNAMOND
By K. W. Wright Deputy

97 MAR 20 PM 4:14

U.S. DISTRICT COURT
DISTRICT OF OREGON
PORTLAND, OREGON

BY K. W. Wright

Certified to be a true and correct
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Date: 3/24/97
Donald M. Cinnamond, Clerk

By: K. W. Wright, Deputy

CLERK, U.S. BANKRUPTCY COURT
DISTRICT OF OREGON

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In re

SMITH'S HOME FURNISHINGS, INC.,

Debtor.

MICHAEL B. BATLAN, Trustee,

Plaintiff-Appellee,

v.

MERCHANTS HOME DELIVERY
SERVICE, INC.,

Defendant-Appellant.

Bankruptcy Case No.
395-35704-elp7

Adversary Proceeding
No. 96-3024

Civil No. 97-368-FR

OPINION AND ORDER

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4/25/97

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1 FRYE, Judge:

2 The matter before the court is the appeal of Merchants Home Delivery Service,
3 Inc. from a final judgment entered by the United States Bankruptcy Court on December 5,
4 1996.

5 On December 5, 1996, the Honorable Elizabeth L. Perris, United States Bankruptcy
6 Judge, entered an order granting the motion of the trustee in bankruptcy for summary judg-
7 ment and denying the motion of Merchants Home Delivery Service, Inc. for summary
8 judgment based upon her letter opinion dated November 27, 1996. A final judgment was
9 entered on December 5, 1996.


10 A grant of summary judgment is reviewed de novo. Bagdadi v. Nazar, 84 F.3d
11 1194, 1197 (9th Cir. 1996). This court must determine, after viewing the evidence in the
12 light most favorable to Merchants Home Delivery Service, Inc., whether there are any gen-
13 uine issues of material fact and whether the bankruptcy court correctly applied the relevant
14 substantive law. Id.

15 This court has carefully reviewed the record presented to it and the letter opinion of
16 Judge Perris dated November 27, 1996. In reaching her decision, Judge Perris relied upon
17 facts which are not in dispute. This court finds that she correctly applied the relevant sub-
18 stantive law to the undisputed facts. The letter opinion is well-reasoned and well-written.

19 The final judgment of the United States Bankruptcy Court filed on December 5,
20 1996 is hereby AFFIRMED.

21 IT IS SO ORDERED.

22 DATED this 20 day of March, 1997.

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HELEN J. FRYE
25 United States District Judge
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